Supreme Court, U.S.
FILED

01 • 639 OCT 17 2001

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL ET AL.,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID HONIG
MINORITY MEDIA & TELECOMMUNICATIONS COUNCIL
3636 16th Street #B-366
Washington, D.C. 20010
(202) 332-0500

ANGELA J. CAMPBELL
AMY S. WOLVERTON
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9535

FREDERICK C. SCHAFRICK
THOMAS J. MIKULA
Counsel of Record
ADAM M. CHUD
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

ELLIOT M. MINCBERG
LAWRENCE S. OTTINGER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M. Street, N.W.
Washington, D.C. 20036
(202) 467-4999

October 17, 2001

Counsel for Petitioners
[Additional counsel inside cover]

Additional Counsel:

MARTHA F. DAVIS
NATIONAL ORGANIZATION
FOR WOMEN
LEGAL DEFENSE AND
EDUCATION FUND
399 Hudson Street
New York, NY 10014
(212) 925-6635

QUESTION PRESENTED

Whether the court of appeals departed from basic principles of judicial restraint by (a) failing to defer to the Federal Communication Commission's interpretation of its equal employment opportunity regulations for broadcasters and cable operators, (b) striking down those regulations on their face prior to their implementation, and (c) effectively overruling statutory provisions mandating those regulations.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

I. Parties

A. Petitioners

Minority Media and Telecommunications Council
African American Media Incubator
Alliance for Community Media
Alliance for Public Technology
American Civil Liberties Union
Black College Communications Association
Civil Rights Forum on Communications Policy
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Minority Business Enterprise Legal Defense and Education Fund
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association for the Advancement of Colored People
National Association of Black Journalists
National Bar Association
National Council of La Raza
National Hispanic Foundation for the Arts,
National Hispanic Media Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix, and San Antonio Chapters
National Latino Telecommunications Taskforce
National Urban League
People for the American Way

Project on Media Ownership
Puerto Rican Legal Defense and Education Fund
Rainbow/PUSH Coalition
Telecommunications Research and Action Center
Women's Institute for Freedom of the Press
National Organization for Women
Center for Media Education
Feminist Majority Foundation
Pennsylvania Lesbian and Gay Task Force

B. Respondents

Maryland-District of Columbia-Delaware Broadcasters Association, Inc.
Alabama Broadcasters Association
Alaska Broadcasters Association
Arizona Broadcasters Association
Arkansas Broadcasters Association
California Broadcasters Association
Colorado Broadcasters Association
Connecticut Broadcasters Association
Florida Association of Broadcasters
Georgia Association of Broadcasters
Hawaii Association of Broadcasters
Idaho State Broadcasters Association
Illinois Broadcasters Association
Indiana Broadcasters Association
Iowa Broadcasters Association
Kansas Association of Broadcasters
Kentucky Broadcasters Association
Louisiana Association of Broadcasters
Maine Association of Broadcasters
Massachusetts Broadcasters Association
Michigan Association of Broadcasters
Minnesota Broadcasters Association
Mississippi Association of Broadcasters

Missouri Broadcasters Association
Montana Broadcasters Association
Nebraska Broadcasters Association
Nevada Broadcasters Association
New Hampshire Association of Broadcasters
New Jersey Broadcasters Association
New Mexico Broadcasters Association
New York State Broadcasters Association
North Carolina Association of Broadcasters
North Dakota Broadcasters Association
Ohio Association of Broadcasters
Oklahoma Association of Broadcasters
Oregon Association of Broadcasters
Pennsylvania Association of Broadcasters
Radio Broadcasters Association of Puerto Rico
Rhode Island Broadcasters Association
South Carolina Broadcasters Association
South Dakota Broadcasters Association
Tennessee Association of Broadcasters
Texas Association of Broadcasters
Utah Broadcasters Association
Vermont Association of Broadcasters
Virginia Association of Broadcasters
Washington State Association of Broadcasters
West Virginia Broadcasters Association
Wisconsin Broadcasters Association
Wyoming Association of Broadcasters
Federal Communications Commission
United States of America
United Church of Christ, Office of Communication, Inc.
(expected to petition separately)

II. Rule 29.6 Statement

Petitioners are each non-profit organizations. No Petitioner or its parent has issued any shares or debt securities to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 12

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S STANDARDS FOR EVALUATING FACIAL CHALLENGES 13

A. This Court Has Imposed A High Threshold For Sustaining A Facial Challenge 14

B. The Court of Appeals Ignored This Court's Facial Challenge Jurisprudence and Improperly Found the EEO Rules Facially Unconstitutional Based on Speculative Conclusions That the Rules Would Be Implemented Contrary To the FCC's Report and Order 15

1. The Court of Appeals' Conclusion That Option B Would "Pressure" Licensees to Recruit Minorities and Women Is At Odds With the Manner in Which the FCC Plans To Implement That Option 16

2. The Court of Appeals' Conclusion that the EEO Rules Would Harm Non-Minorities Was Based on Speculation Not Supported By the Record Before the FCC 19

3. Option B's Data Collection Requirement Does Not Render It Facially Unconstitutional 21

II. THE COURT OF APPEALS DEPRIVED FCC AND OTHER AGENCY REGULATIONS OF THE PRESUMPTION OF CONSTITUTIONALITY 24

III. THE COURT OF APPEALS HAS, *SUB SILENTIO*, STRUCK DOWN ACTS OF CONGRESS THAT MANDATED THE FCC'S EEO RULES 25

IV. THE ISSUES IN THIS CASE ARE RELATED TO ISSUES IN *ADARAND CONSTRUCTORS, INC.* v. *MINETA* 28

CONCLUSION 30

APPENDIX (SEPARATE VOLUME)

APPENDIX A 1a

Court of Appeals Panel Opinion

APPENDIX B 20a

Court of Appeals Order Denying Rehearing and Opinion Dissenting From Denial of Rehearing *En Banc*

APPENDIX C 37a

47 C.F.R. § 2080

APPENDIX D 49a

Relevant Portions of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, *Report and Order*, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329

APPENDIX E 269a

Relevant Provisions of the Cable Communications Policy Act of 1984, Pub L. No. 98-549, 98 Stat. (1984)

APPENDIX F 276a

Relevant Provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub L. No. 102-385, 106 Stat. 1460 (1992)

APPENDIX G 281a

47 C.F.R. § 73.2080 (1992)

APPENDIX H 286a

47 U.S.C. § 554

TABLE OF AUTHORITIES

CASES: **Page**

Adarand Constructors, Inc. v. *Mineta*, No. 00-730 13

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) 10

Adarand Constructors, Inc. v. *Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted sub nom. Adarand Constructors, Inc.* v. *Mineta*, 121 S. Ct. 1401 (2001) 28-29

Amendment of Part 76 Cable EEO Rules, 102 F.C.C.2d 562 (1985) 6

Amendment of the Commission's Rules to Require Operators to Show Nondiscrimination in Their Employment Practices, 34 F.C.C.2d 186 (1972) 5

Applications of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia, 95 F.C.C.2d 1 (1983) 17

Bennett Gilbert Gaines, 10 F.C.C. Rcd. 6589 (Admin. L.J. 1995) 17

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 24

Broadcast EEO Amendments, 2 F.C.C. Rcd. 3967 (1987) 5

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 14

Columbus Broad. Co., 40 F.C.C. 641 (1965) 4

EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) 23

EEO Processing Guideline Modifications, 46 Rad. Reg. 2d (P&F) 1693, *reconsideration denied*, 79 F.C.C.2d 922 (1980) 5

Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) 26

Hill v. *Colorado*, 530 U.S. 703 (2000) 14

INS v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) 14, 24

Lutheran Church-Missouri Synod v. *FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) 2, 6, 7, 27

MD/DC/DE Broadcasters Ass'n v. *FCC*, 236 F.3d 13, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001) ..... *passim*

Members of the City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 15

NEA v. *Finley*, 524 U.S. 569 (1998) 15

Nondiscrimination in Employment Policies and Practices, 69 F.C.C.2d 1324 (1978) 5

Ohio v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) 14

Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766 (1968) 3-4

Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240 (1969) 4

Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 F.C.C.2d 430 (1970) 4-5

Planned Parenthood of Southeastern Pa. v. *Casey*, 505 U.S. 833 (1992) 14

Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329 (2000) ..... *passim*

Southland Television Co., 10 Rad. Reg. (P&F) 699, *reconsideration denied*, 20 F.C.C. 159 (1955) 4

Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements, 16 F.C.C. Rcd. 2872 (2001) 28

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 24

United States v. *Gainey*, 380 U.S. 63 (1965) 25

United States v. *New Hampshire*, 539 F.2d 277 (1st Cir. 1976) 23

United States v. *Salerno*, 481 U.S. 739 (1987) 11, 12, 14

STATUTES:

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. § 554 *et seq.*) 2, 6

§ 634, 47 U.S.C. § 554 ..... 2, 28

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended at 47 U.S.C. § 334 *et seq.*) 2, 6

47 U.S.C. § 334 27

47 U.S.C. § 334(a) 26

Jury Selection and Service Act of 1968, 28 U.S.C. §1869(h) 22

28 U.S.C. § 1254(1) 1

REGULATIONS:

7 C.F.R. § 1944.266(d)(3) 22

10 C.F.R. § 1040.102(b) 22

12 C.F.R. § 203.4(b) 22

23 C.F.R. § 200.9(b)(4) 22

24 C.F.R. § 107.30(b) 22

29 C.F.R. § 1602.7 22

41 C.F.R. § 60-1.12(c) 22

41 C.F.R. § 60-2.11–2.16 22

47 C.F.R. § 73.2080 1

47 C.F.R. § 73.2080 (1992) 2

47 C.F.R. § 73.2080(b) 5

47 C.F.R. § 73.2080(b) (1992) 26

47 C.F.R. § 73.2080(c)(2) 8

47 C.F.R. § 73.2080(c)(3) (1992) 27

LEGISLATIVE HISTORY:

H.R. Conf. Rep. No. 102-862 (1992) 26, 27

H.R. Rep. No. 98-934 (1984) 6

OTHER AUTHORITY:

Antoinette C. Bush & Marc S. Martin, *The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 Fed. Comm. L.J. 423 (1996) 4

Petitioners Minority Media and Telecommunications Council, *et al.* and National Organization for Women, *et al.*[1] respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 236 F.3d 13, and reprinted at App. 1a. The opinion of the court of appeals denying rehearing and the dissent from the denial of rehearing *en banc* are reported at 253 F.3d 732, and reprinted at App. 20a. The Federal Communication Commission's report and order is reported at 15 F.C.C. Rcd. 2329, and reprinted in relevant part at App. 49a.

JURISDICTION

The court of appeals issued its decision denying rehearing *en banc* on June 19, 2001. The Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including October 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * * ."

47 C.F.R. § 73.2080 is reprinted at App. 37a.

Relevant portions of *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*

---

[1] Petitioners Minority Media and Telecommunications Council, *et al.* and National Organization for Women, *et al.* were two groups of intervenors that filed separate briefs in the court below, but join together in filing the instant Petition.

and Termination of the EEO Streamlining Proceeding, Report and Order, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329 (2000), are reprinted at App. 49a.

Relevant provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. § 554 *et seq.*), are reprinted at App. 269a.

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended at 47 U.S.C. § 334 *et seq.*), are reprinted at App. 276a.

47 C.F.R. § 73.2080 (1992) is reprinted at App. 281a.

47 U.S.C. § 554 is reprinted at App. 286a.

STATEMENT

Introduction. This case concerns the constitutionality of regulations adopted by the Federal Communications Commission ("FCC") in fulfillment of its longstanding efforts and statutory obligation to ensure that broadcasters and cable operators, who hold valuable public licenses or authorizations, provide equal opportunity in their employment practices.

In 1998, the Court of Appeals for the District of Columbia Circuit struck down the FCC's former equal employment opportunity ("EEO") rules. *Lutheran Church–Missouri Synod* v. *FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). The FCC thereafter drafted new EEO rules to avoid the concerns identified in *Lutheran Church*. The new rules contain no quotas or preferences of any kind, and neither require nor encourage broadcasters to make race– or gender–based employment decisions. To the contrary, the new rules explicitly prohibit employment discrimination on the basis of race, gender, and national origin. The new rules do require

broadcasters and cable operators to make information about employment opportunities widely available. Broadcasters can satisfy this basic obligation by selecting one of two supplemental recruitment measures. A broadcaster that selects "Option A" is required to undertake several recruiting programs from a menu of thirteen choices, such as participating in job fairs or sponsoring internship programs. Alternatively, a licensee can select "Option B," which allows broadcasters to create their own recruitment programs and report to the FCC the recruiting efforts undertaken and the race and gender of job applicants.

Respondent state broadcasters associations challenged the new EEO rules on both statutory and constitutional grounds. A panel of the court of appeals rejected the statutory challenges, as well as the constitutional challenge to Option A. But the lower court held that the reporting requirement of Option B unconstitutionally "pressures" broadcasters to make recruiting decisions on the basis of race. The panel struck down the rules in their entirety, and refused to sever Option B from the remainder of the rules or uphold the rules as they pertain to recruitment of women. A sharply divided court, voting 5–3, denied petitions for rehearing *en banc*.

1. History of the FCC's Equal Employment Opportunity Regulations. The FCC's efforts to ensure that broadcasters recruit new employees in a nondiscriminatory manner originated over thirty years ago in *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C.2d 766, 766 (1968). That proposal was justified by a "[n]ational policy against discrimination in hiring," and by the privileged status that broadcast licensees maintain as recipients of valuable public

benefits.[2] *Id.* at 769–70. In 1969, the FCC formally adopted rules prohibiting broadcasters from discrimination in employment on the basis of race, religion, and nationality, and required stations to establish, maintain, and carry out specific practices designed to assure equal employment opportunity. *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240, 248 (1969).

In the order adopting the 1969 EEO regulations, the Commission proposed, and subsequently adopted, supplemental rules requiring licensees to submit statistical data and more detailed written programs. *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C.2d 430 (1970). Those rules required licensees and applicants for licenses to describe their equal employment programs, *id.* at 432, and required licensees

---

[2] That policy was also justified by the history of discriminatory practices by or involving the Commission, and by broadcasters. The Commission did not award any broadcast licenses to minority-controlled entities before 1956. Antoinette C. Bush & Marc S. Martin, *The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 Fed. Comm. L.J. 423, 439 (1996). The Commission also had a record of accepting and perpetuating discriminatory practices by licensees. For example, in 1955, the FCC awarded a license to a segregationist that built a one-story movie theater to evade Louisiana law requiring admission of blacks to one story of a two-story theater because limiting admission of blacks "to theatre balconies appears to be legal in Louisiana." *Southland Television Co.*, 10 Rad. Reg. (P&F) 699, *reconsideration denied*, 20 F.C.C. 159 (1955). In 1965, the FCC merely "admonished" a Mississippi licensee after riots ensued when that station urged listeners to physically prevent James Meredith from enrolling in the University of Mississippi. *Columbus Broad. Co.*, 40 F.C.C. 641 (1965). A more complete statement of the FCC's history of discriminatory practices was presented to the Commission in the rulemaking proceeding that led to the rules at issue. See 1 Comments of EEO Supporters, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity rules and Policies and Termination of the EEO Streamlining Proceeding* at 104–16 (Mar. 5, 1999) (Ct. App. J.A. 414–26).

with five or more employees to annually submit forms reporting on their employment of minorities. *Id.* at App. B. In requiring the submission of such data, the Commission stated: "We have not suggested that such data for any particular year would demonstrate the existence of discrimination at any station. What we do believe is that it is useful to show industry employment patterns and to raise appropriate questions as to the causes of such patterns." *Id.* at 431.[3]

Prior to 1987, the FCC's enforcement of its EEO rules focused on whether licensees satisfied "processing guidelines," which involved a comparison of a licensee's actual employment of women and minorities with the overall availability of those groups in the local labor market. *EEO Processing Guideline Modifications*, 46 Rad. Reg. 2d (P&F) 1693, *reconsideration denied*, 79 F.C.C.2d 922 (1980). In 1987, the Commission modified its approach and adopted a policy measuring compliance with the EEO rules based on a licensee's efforts at compliance. *Broadcast EEO Amendments*, 2 F.C.C. Rcd. 3967 (1987). Although the FCC retained the processing guidelines, see *id.* at 3974, the Commission's focus shifted to the licensee's efforts to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice." 47 C.F.R. § 73.2080(b).

Congressional enactments have endorsed, strengthened, and, in some circumstances, mandated the FCC's EEO rules. For

---

[3] The FCC first applied EEO rules to the cable television industry in 1972. *Amendment of the Commission's Rules to Require Operators to Show Nondiscrimination in Their Employment Practices*, 34 F.C.C.2d 186 (1972). Those rules were expanded in 1978, requiring nondiscrimination and an ongoing program of specific measures to ensure equal employment opportunity. *Nondiscrimination in Employment Policies and Practices*, 69 F.C.C.2d 1324 (1978).

instance, in 1984, Congress enacted detailed EEO requirements applicable to cable television systems.[4] Those requirements sought to "codif[y] and strengthen[] the Commission's existing equal employment opportunity regulations." H.R. Rep. No. 98–934, at 86 (1984). In 1992, Congress codified the FCC's then-existing EEO requirements for broadcast television and extended the cable television EEO requirements to all other multichannel video programming distributors.[5] In the 1992 Act, Congress recognized that "females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries" and that "rigorous enforcement of equal opportunity rules and regulations is required in order to effectively deter racial and gender discrimination." App. 276a–277a. Further, Congress directed the FCC to report the effectiveness of its EEO rules "in promoting the congressional policy favoring increased employment opportunity for women and minorities" and to advance "such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary." App. 280a.

2. The *Lutheran Church* Decision. In 1997, the Lutheran Church–Missouri Synod sought review of an FCC determination that the Church had violated the FCC's EEO regulations by making insufficient efforts to recruit minorities for employment at two of its stations. A panel of the District of Columbia Circuit held that the rules did not survive constitutional scrutiny. *Lutheran Church–Missouri Synod* v. *FCC*, 141 F.3d 344, 351–52 (D.C. Cir. 1998). The court ruled

---

[4] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984). In 1995, the FCC adopted rules to implement the EEO provisions of the 1984 Act. See *Amendment of Part 76 Cable EEO Rules*, 102 F.C.C.2d 562 (1985).

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992).

that the FCC's "processing guidelines," used to assess compliance with the EEO rules as part of the license renewal process, "pressure[d] stations to maintain a workforce that mirrors the racial breakdown of their 'metropolitan statistical area.'" *Id.* at 352. The court denied rehearing, 154 F.3d 487 (D.C. Cir. 1998), and rehearing *en banc*, with four judges dissenting. 154 F.3d 494 (D.C. Cir. 1998). In its denial of rehearing, the panel made clear that its holding did not "mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny." 154 F.3d at 492.

3. The FCC's New EEO Rules. Following *Lutheran Church*, the FCC adopted new EEO rules attempting to synthesize its Congressional mandate to enforce equal employment opportunity rules with the *Lutheran Church* decision. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, 15 F.C.C. Rcd. 2329 (2000) ("R&O"), App. 49a–268a. The new rules eliminated the processing guidelines found unlawful in *Lutheran Church*, but retained the basic requirement that broadcasters refrain from employment discrimination, as "discrimination by broadcasters and cable entities is manifestly contrary to the public interest and cannot be tolerated." *Id.* ¶¶ 65, 72, App. 104a, 109a–110a. The Commission also sought to eliminate the heavy reliance by broadcasters upon "word-of-mouth" recruiting, to "ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process." *Id.* ¶ 3, App. 52a.

To accomplish this end, the rules imposed a "basic obligation" that broadcasters "widely disseminate information concerning each full-time job vacancy" because "repeated hiring without broad outreach may unfairly exclude minority and women job candidates." *Id.* ¶¶ 3, 78, App. 52a, 113a.

Nonetheless, the FCC made clear that it was not requiring broadcasters to engage in "targeted" recruiting of women and minorities. R&O ¶ 77, App. 113a. Instead, licensees were required to choose one of two "Supplemental Recruitment Measures." *Id.* ¶ 78, App. 114a. The first supplemental recruitment option ("Option A") requires licensees to undertake either two or four (depending on the number of individuals the licensee employs) recruiting outreach initiatives every two years from a list of thirteen possible choices. See 47 C.F.R. § 73.2080(c)(2), App. 39a–40a; R&O ¶¶ 101–02, App. 130a–132a. Those choices include, among others: participating in job fairs; listing job openings "in a job bank or newsletter of a media trade group whose membership includes substantial participation of women and minorities"; and establishing an internship program. Although broadcasters that select Option A must maintain (but not routinely file) records documenting compliance with the rules, they are not required to maintain data concerning the race, ethnicity, or gender of applicants, persons interviewed, or individuals actually hired following these outreach efforts. R&O ¶¶ 78, 111–13, 116–18, App. 113a–116a, 137a–142a,

Broadcasters that choose not to undertake the enumerated supplemental recruitment measures of Option A can select "Option B" and "design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, *i.e*, that it widely disseminates job vacancies throughout the local community." R&O ¶ 104, App. 133a.[6] A broadcaster that chooses Option B must annually place in the

---

[6] The Commission enacted Option B at the urging of, among others, the Virginia and North Carolina Associations of Broadcasters, R&O ¶ 104 & n.180, App. 133a-134a, "to accord broadcasters flexibility in designing outreach programs that are tailored to the needs of their station and community." *Id.* ¶77, App. 113a. These associations were among those that then challenged Option A and Option B before the court of appeals.

station's public file a report containing the recruitment source, race, gender and national origin for each job applicant. *Id.* ¶ 78, App. 113a–116a. The Commission emphasized that, although applicant pool data "will be one pertinent source of information," any final decision as to compliance by broadcasters who select Option B would not be made "on statistical records alone," and would "not consider the extent to which minorities and women were actually hired." *Id.* ¶ 115, App. 139a–140a. The Commission also emphasized that it "may ultimately determine that outreach efforts [under Option B] are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings." *Id.* at ¶ 120, App. 142a–143a.

4. The Panel Decision Below. Prior to any implementation of the FCC's new EEO rules, state broadcasters associations (the "Broadcasters") challenged the rules on their face on statutory and constitutional grounds. The court of appeals rejected the Broadcasters' statutory challenges, concluding that the rules are adequately justified by the FCC's intention to "prevent invidious discrimination," and because the rules do not "arbitrarily and capriciously increase[] the 'regulatory burden' on stations." *MD/DC/DE Broadcasters Ass'n* v. *FCC*, 236 F.3d 13, 18 (D.C. Cir. 2001), App. 7a–8a.[7] The panel also rejected the challenge to Option A, stating that it does not "meaningfully pressure" broadcasters to recruit women and minorities. *Id.* at 18–19, App. 9a–10a.

The court of appeals, however, concluded that Option B "does create pressure to focus recruiting efforts upon women and minorities in order to induce more applications from those groups." *Id.* at 19, App. 10a. The panel found this "pressure"

---

[7] The panel held that a separate petition for review filed by the Office of Communication, Inc., United Church of Christ ("UCC") was moot in light of its holdings on the Broadcasters' petition for review. App. 19a.

solely from its interpretation of the FCC's proposed enforcement of the rules. The court of appeals maintained that "[u]nder Option B the Commission promises to investigate any licensee that reports 'few or no' applications from women or minorities." *Id.*

The court of appeals then held that this perceived "preferential recruiting" is subject to strict equal protection scrutiny per *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), because it believed that Option B

> "compel[s] broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates. As a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." App. 13a–14a.

The panel cited as an example of this redirection of resources that a broadcaster might shift from purchasing an advertisement in "the local newspaper" to a smaller advertisement in that newspaper and an advertisement "in a publication targeted at minorities." 236 F.3d at 21 n.***, App. 14a. The court of appeals identified no record support for its analysis of the potential impact of the rules.

The court of appeals then held that the rules do not withstand strict scrutiny because they are not narrowly tailored. The panel so held for two reasons. First, the panel reiterated its previous conclusion that "Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated." *Id.* at 21, App. 15a–16a. The panel also concluded that Option B's data submission requirement is "not probative on the question of a licensee's efforts to achieve 'broad outreach.'" *Id.* at 22, App. 16a–17a.

Finally, the court of appeals refused to sever Option B from the remainder of the rules because, despite the Commission's stated intention that the rules "be treated as severable," the "core of the rule * * * is to provide broadcasters with two alternatives" and "the court cannot by severing one alternative make the other mandatory." *Id.*, App. 17a–18a. Therefore, the panel vacated the rules in their entirety. *Id.* at 23, App. 18a–19a.

5. Petitions For Rehearing or Rehearing *En Banc*. The FCC sought rehearing of the court of appeals' decision concerning the severability of Option B, while intervenors below petitioned for rehearing or rehearing *en banc* concerning the panel's equal protection analysis.[8] The panel denied rehearing, and a five-judge majority of the D.C. Circuit rejected the petitions for rehearing *en banc*.

Three judges dissented from the denial of *en banc* review, and would have granted rehearing on both the equal protection and severability questions. *MD/DC/DE Broadcasters* Ass'n v. *FCC*, 253 F.3d 732, 736, 739 (D.C. Cir. 2001) (Tatel, J., dissenting from denial of rehearing *en banc*), App. 27a, 32a. Citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), the dissent noted that the panel had struck down the FCC's EEO rules based on a facial challenge. The dissent then explained that the panel had improperly concluded that "Option B could not be applied without harming white males." 253 F.3d at 736, App. 27a. In the dissenters' view, Option B "merely requires outreach to the entire community, and broadcasters can accomplish such outreach without reducing their recruitment of white males." *Id.* at 737, App. 28a. A broadcaster that conducts outreach in the form of "advertising in a local

---

[8] The UCC also sought rehearing on, among other issues, the panel's decision to strike down the EEO rules based on a facial challenge. UCC Petition for Rehearing or Rehearing *En Banc* at 18–19.

newspaper" would therefore "satisfy [the] obligation simply by undertaking broad, non-racially-targeted recruiting." *Id.* at 738, App. 29a. Therefore, the dissent concluded that "there exist 'circumstances . . . under which' broadcasters can comply with Option B with no adverse effect on white males" and that "the broadcasters' facial challenge should have failed." *Id.* (citing *Salerno*, 481 U.S. at 745).

The dissenters also focused on the panel's unsupported conclusion that Option B "pressures" broadcasters to make recruiting decisions on the basis of race. The dissent explained that, despite the panel's statement to the contrary, "[t]he Commission never 'promise[d]' to investigate licensees that report few or no applications from women or minorities" and the panel's "speculation that some broadcasters, imagining pressure from the Commission or misreading the agency's intentions, might go beyond what Option B requires is no reason to declare it facially unconstitutional." *Id.* at 738–39, App. 31a.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision to strike down the FCC's EEO rules based on a facial challenge disregarded this Court's standards for evaluating facial challenges. The facial challenge standards protect statutes and regulations from attack on the basis of speculation about their hypothetical effect. In ignoring these standards, the court of appeals failed to give proper deference to the manner in which the FCC proposed to implement the EEO rules, and reached its conclusions that broadcasters would diminish their recruitment of white males in an effort to comply with the rules without the support of *any* record evidence. This failure to credit the FCC's express representations regarding its plans for implementing the rules fundamentally undercuts the FCC's ability to interpret its own regulations, in violation of this Court's holdings that courts should defer to agency interpretations of their regulations.

Further, certiorari is warranted because the court of appeals' decision to strike down the FCC regulations on their face also has the effect of overturning *sub silentio* federal statutes requiring the FCC to maintain and enforce EEO programs in the broadcast and cable industries. Review is also appropriate because the issues presented by this case are related to issues before this Court in *Adarand Constructors, Inc.* v. *Mineta*, No. 00-730.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S STANDARDS FOR EVALUATING FACIAL CHALLENGES.

Failing to properly apply this Court's standards for the review of facial challenges, the court of appeals struck down the FCC's new EEO rules by surmising that the FCC would enforce the rules in an unconstitutional manner. Thus, instead of properly ascertaining whether the FCC was likely to apply the rules constitutionally, or determining that there was no possible way to do so, or waiting for an as applied challenge showing enforcement that raises constitutional questions, the court of appeals improperly relied on an improbable scenario in which the FCC would "pressure" broadcasters to make recruiting decisions on the basis of race and deny information about job opportunities to non-minority males. The lower court's conclusions were not grounded in *any* record evidence and conflicted with the FCC's proposed implementation of the rules. The court of appeals therefore turned the facial challenge inquiry on its head.

By ignoring the standards that this Court has set forth for the conduct of facial challenges, the court of appeals effectively held that courts have unlimited authority to strike down agency regulations based on facial challenges so long as the court can envision a scenario, however unlikely, in which the regulations might be implemented improperly. Because that holding

fundamentally threatens the ability of administrative agencies to enact regulations that satisfy constitutional scrutiny, especially in the important area of equal employment opportunity, this issue warrants review by this Court.

A. This Court Has Imposed A High Threshold For Sustaining A Facial Challenge.

The EEO rules cannot be nullified on their face merely because the FCC *might* apply them in an unconstitutional manner. To the contrary, "[t]he fact that the [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).[9]

It is likewise improper for a court to "invalidate[] [a] statute on a facial challenge based upon a worst-case analysis that may never occur." *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990). Moreover, potential difficulties in the administration of a neutral law are "no[t] well suited to consideration on a facial challenge." *Hill* v. *Colorado*, 530 U.S. 703, 740 (2000) (Souter, J., concurring).

---

[9] Although the precise formulation of the facial challenge standard is a matter of some dispute, in the present case, the facial constitutionality of the FCC's EEO rules does not depend upon the language of any particular test, because the rules satisfy each such standard that this Court has previously identified. *E.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973) (facial challenge to statute on First Amendment overbreadth grounds must establish that the invalid application of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"); *Salerno*, 481 U.S. at 745 (facial challenge to Bail Reform Act must establish that "no set of circumstances exists under which the Act would be valid"); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 895 (1992) (reproductive rights decision held that a statute is facially invalid if it is a "substantial obstacle" to exercise of right in a "large fraction" of cases); *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("That the regulation may be invalid as applied in [some] cases, * * * does not mean that the regulation is facially invalid.").

The high threshold for facial challenges grows out of "the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court," which facial challenges do not. *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). Therefore, this Court has employed facial challenges "'sparingly and only as a last resort,'" and noted that such challenges "confront 'a heavy burden'" and are "'generally disfavored.'" *NEA* v. *Finley*, 524 U.S. 569, 580 (1998) (citations omitted).

B. The Court of Appeals Ignored This Court's Facial Challenge Jurisprudence and Improperly Found the EEO Rules Facially Unconstitutional Based on Speculative Conclusions That the Rules Would Be Implemented Contrary To the FCC's Report and Order.

The court of appeals' decision conflicts with this Court's facial challenge standards, which the panel never even addressed. Instead, the court below did precisely what this Court's jurisprudence forbids: it imagined a worst-case scenario, and struck down the rules because it assumed that broadcasters would feel "pressured" by the regulations to target their recruiting towards women and minorities. The panel hypothesized that this pressure would deprive non-minority men of information about job openings that they would otherwise have received. This reliance on a hypothetical worst-case scenario jeopardizes the presumption of constitutionality of virtually all regulations that arguably present constitutional issues. Under the panel's decision, challengers could have regulations struck down merely by arguing (without any evidence) that an agency might implement the regulation improperly, even though the agency states that it plans to implement the regulations in a contrary and wholly permissible manner. Certiorari should be granted to address this important issue.

1. The Court of Appeals' Conclusion That Option B Would "Pressure" Licensees to Recruit Minorities and Women Is At Odds With the Manner in Which the FCC Plans To Implement That Option.

The court of appeals first exceeded the scope of a proper facial challenge when it concluded that FCC would "pressure" broadcasters to recruit on the basis of race. The lower court reasoned that the FCC's collection of applicant pool data to ensure compliance with Option B would exert such pressure, because it concluded that the Commission "promises to investigate any licensee that reports 'few or no' applications from women or minorities." 236 F.3d at 19, App. 11a. The court viewed such data collection as permitting inappropriate reliance by the FCC on the composition of application pools, because "[a] regulatory agency *may* be able to put pressure upon a regulated firm in a number of ways, some more subtle than others." *Id.*, App. 10a (emphasis added).

The panel's reasoning completely disregarded the FCC's explanation of Option B. In fact, the FCC never stated that it would single out for enforcement actions licensees that select Option B and report "few or no" women and minorities in their applicant pools. To the contrary, the FCC said that it would evaluate the outreach programs of *every* licensee that chooses Option B to determine whether that licensee has engaged in broad outreach. R&O ¶ 115, App. 139a–140a.

In addition, despite the panel's conclusion to the contrary, the FCC stated in no uncertain terms that it was *not* requiring licensees to engage in targeted recruiting. See R&O ¶ 77, App. 113a ("the objective of ensuring that minority and female applicants have the opportunity to apply for positions in the broadcast industry may be achieved without a specific requirement that broadcasters * * * use recruitment methods that specifically target those groups"). A broadcaster that

misinterprets the FCC's statement that Option B does not require it to conduct targeted recruiting to mean that it must conduct targeted recruiting does so on its own accord, not by government mandate. See *Broadcasters*, 253 F.3d at 739, App. 31a–32a (Tatel, J., dissenting from denial of rehearing *en banc*).[10]

Furthermore, the FCC made clear that the applicant pool data required under Option B would be used for a limited purpose: evaluating "whether the [recruiting outreach] program is effective in reaching the entire community." R&O ¶ 104, App. 133a–134a. The FCC plainly was not creating incentives for licensees to engage in race-based recruiting under Option B. For example, in paragraph 120 of its Report and Order, the Commission detailed the manner in which it planned to use the application pool data to evaluate Option B recruiting programs. Paragraph 120 reads:

> "[T]here is no requirement that the composition of applicant pools be proportionate to the composition of the local work force. However, few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community. * * * *We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for*

---

[10] The FCC has made clear that racial discrimination in employment by broadcasters is unacceptable. *E.g.*, *Applications of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia*, 95 F.C.C.2d 1, 9 (1983) (in rejecting licensee proposal to replace white receptionist when qualified black receptionist was found, Commission noted that "particular positions are not to be set aside for any reason that would suggest discrimination"); *Bennett Gilbert Gaines*, 10 F.C.C. Rcd. 6589, 6593 (Admin. L.J. 1995) (reserving vacancies for minorities was "inconsistent with the Commission's EEO rules").

> *openings. Conversely, the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs. The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community.*" R&O ¶ 120, App. 142a–143a (emphasis added).

Therefore, the FCC told licensees that they gain *no* advantage by making recruiting decisions on the basis of race or sex. Broadcasters will not be deemed in compliance with the obligation to conduct "broad outreach" simply because a large number of women and minorities are included in applicant pools. Conversely, the Commission stated that even a recruitment program that results in few women or minority applicants may nonetheless have satisfied the obligation to conduct broad outreach.[11]

The court of appeals' speculation that the FCC would use applicant pool data in a manner other than that specified is both beyond the scope of a facial challenge and contrary to the record. The panel's rejection of the FCC's interpretation of its

---

[11] See also R&O ¶ 115, App. 139a–140a (FCC will look at a range of factors to determine whether Option B recruitment program achieved broad outreach, including, but not limited to, "the reach of the recruitment sources utilized (such as the circulation of media in which vacancies were advertised), whether the broadcaster adequately analyzed the results of its efforts, implemented effective measures to correct any problems, and avoided excessive reliance on word-of-mouth recruitment").

rules both prevents the Commission from determining how it will implement its own regulations, and jeopardizes the ability of any agency to adopt regulations that will survive constitutional scrutiny, as the regulations could be found unconstitutional simply based on speculation by a court that they might be implemented improperly, despite all record evidence to the contrary. This issue goes to the heart of an agency's ability to implement its regulations, and therefore warrants review by this Court.

2. The Court of Appeals' Conclusion that the EEO Rules Would Harm Non–Minorities Was Based on Speculation Not Supported By the Record Before the FCC.

The court of appeals further departed from this Court's facial challenge standards when it concluded that broadcasters would necessarily implement the rules to deprive non-minority males of information about job openings that they would have received absent the rules. This conclusion puts in constitutional jeopardy virtually every agency regulation that a court, on conjecture alone, determines might have unintended consequences when implemented.

The court of appeals concluded that the EEO rules could not be implemented in a constitutional manner because

> "[u]nder Option B the Commission has compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates. As a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." 236 F.3d at 20–21, App. 13a–14a (footnote omitted).

The court of appeals continued:

> "If an employer believed that it could reach the maximum number of good prospects with a display ad in the local newspaper, but they would likely be non-minorities, then it nonetheless would choose to run a smaller newspaper ad and use its remaining funds to run an ad in a publication targeted at minorities." *Id.* at 21 n.***, App. 14a.

These conclusions—which were not supported in any respect by the record—plainly conflict with the proper standards for evaluating facial challenges. First, the FCC has not "compelled broadcasters to redirect their necessarily finite recruiting resources." Nothing in the administrative record suggests that a licensee who selects Option B would have to diminish its recruitment of non-minorities to comply.

The court of appeals' conclusion also assumes, without evidence, that broad recruiting outreach is a "zero sum" practice, such that any effort to ensure that minorities learn of employment opportunities will inevitably deprive non-minorities of information. Licensees, however, could just as likely accomplish broad outreach to all sectors of the community without depriving anyone of information on the basis of their race. See 253 F.3d at 739, App. 32a (Tatel, J., dissenting from denial of rehearing *en banc*) ("Even assuming, as the panel speculated, that recruiting budgets are 'fixed in the short run,' there is no reason to believe that broadcasters would not reallocate recruiting expenditures without depriving nonminorities of job information.") (citation omitted). The Commission viewed with favor recruitment methods such as "e-mail and fax [that] make the notification of a large number of sources less burdensome." R&O ¶ 92, App. 125a. It costs little or nothing to add additional recipients to fax or e-mail distribution lists.

The panel's hypothetical that broadcasters would implement Option B by placing small ads in two newspapers rather than one larger one in "the local newspaper" is similarly without record support. 236 F.3d at 21 n.***, App. 14a. Furthermore, the hypothetical erroneously assumes that the "local" newspaper is one read only by white males, while other newspapers are read only by minorities and women.

In addition, the lower court inappropriately speculated that individuals who would have learned about job opportunities absent Option B will be deprived of that knowledge under Option B. The Broadcasters presented no evidence on this point to the Commission, and indeed never made this argument to the panel. Further, it is just as likely, if not more likely, that a recruitment program that achieves "broad outreach" will reach *more* white males than a program that does not do so. *Broadcasters*, 253 F.3d at 738 (Tatel, J. dissenting from denial of rehearing *en banc*), App. 29a.

In short, the court of appeals' decision simply assumes that Option B would make non-minorities into victims of discrimination without evidence to support that conclusion. In fact, although the FCC has enforced EEO requirements for over thirty years, the record contains no evidence of even one complaint of reverse discrimination by a broadcaster or a job applicant. This speculation about the effects of Option B plainly was inappropriate in the context of a facial challenge, and threatens the ability of any regulation to satisfy constitutional scrutiny if there is any chance that the agency might implement it improperly. This issue warrants review by this Court.

3. Option B's Data Collection Requirement Does Not Render It Facially Unconstitutional.

It is also important that the Court grant certiorari to ensure that lower federal courts do not strike down facially neutral regulations requiring the collection and reporting of race and

gender data merely because one might imagine a scenario in which the data might be used improperly. The panel struck down Option B because it concluded that the collection of applicant pool data would "subtl[y]" pressure broadcasters to target their recruiting towards minorities and women. 236 F.3d at 19, App. 10a. Never before has a federal appeals court raised such serious questions about the constitutional infirmities of race and gender data collection without any record evidence that the data were or would be used improperly.

The importance of race and gender data collection is reflected by the widespread collection of such data by government agencies. For example, the EEOC has adopted regulations under Title VII of the 1964 Civil Rights Act requiring employers to report the race of employees. 29 C.F.R. § 1602.7.[12] There is little dispute that race and gender data

---

[12] See also, *e.g.*, Jury Selection and Service Act of 1968, 28 U.S.C. § 1869(h) (requires federal government to "elicit" the race of all individuals considered for jury duty); 7 C.F.R. § 1944.266(d)(3) (Department of Agriculture grant recipients "must maintain current data on the race, ethnicity and gender of program applicants and beneficiaries."); 10 C.F.R. § 1040.102(b) (recipients of assistance from Department of Energy must make available "data on program participants, identified by race, color, national origin, sex, age and handicap status"); 12 C.F.R. § 203.4(b) (banks must collect "data about the race or national origin and sex" of home loan applicants); 23 C.F.R. § 200.9(b)(4) (state highway agency compliance with Title VI requires "collection of statistical data (race, color, religion, sex, and national origin) of participants in, and beneficiaries of State highway programs"); 24 C.F.R § 107.30(b) (lenders participating in HUD mortgage insurance programs must "maintain data regarding the race, religion, national origin and sex of each applicant * * * for assistance"); 41 C.F.R. § 60-1.12(c) (Office of Federal Contract Compliance Programs requires Government contractors, depending on their size, to document "(i) [t]he gender, race, and ethnicity of each employee; and (ii) where possible, the gender, race, and ethnicity of each applicant."); 41 C.F.R. § 60-2.11–2.16 (requiring qualifying nonconstruction government contractors to develop written analysis of their workforces by race, gender, and ethnicity and compare the representation of women and minorities with the availability of

collection is necessary for the government to identify and remedy discrimination. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 80–81 (1984) (Title VII data submission helps the EEOC to "identify and eliminate systemic employment discrimination"); see also Brief for the Respondents [United States] in *Adarand Constructors, Inc.* v. *Mineta*, No. 00-730, at 46 ("the government has a responsibility to identify and remedy racial discrimination" and the government "could not discharge that duty without using race-conscious mechanisms for identifying whether racial discrimination exists").

If the FCC uses the applicant pool data improperly, any broadcaster can challenge that improper application of the rules. See 253 F.3d at 738 (Tatel, J., dissenting from denial of rehearing *en banc*), App. 29a. Such an as applied challenge would both protect the interests of broadcasters and insulate the rules from challenge based on speculation about how the Commission *might* implement them. *Cf. United States* v. *New Hampshire*, 539 F.2d 277, 280 (1st Cir. 1976) (Title VII data collection regulations are constitutional because "[s]tatistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted. And any positive steps which the United States might subsequently take as a result of its interpretation of the data in question remain subject to law and judicial scrutiny.").

In short, the court of appeals' decision to strike down the rules on their face based on speculation about FCC enforcement and misuse of statistical data therefore deprives the FCC of the chance to appropriately implement the rules. It also threatens any agency's ability to craft similar data collection rules in the future that can withstand a facial challenge. Because of the potential broad–ranging impact that the court of appeals'

---

qualified women and minorities in the "reasonable recruitment area").

decision will have on future agency rule making and data collection, the decision below warrants review by this Court.

II. THE COURT OF APPEALS DEPRIVED FCC AND OTHER AGENCY REGULATIONS OF THE PRESUMPTION OF CONSTITUTIONALITY.

The court of appeals' decision puts in jeopardy any agency rule that a court concludes might be implemented improperly. When a court, weighing a facial constitutional challenge to regulations, disregards or discredits numerous material representations made by the government in an official order, it is difficult to see how any agency regulations on a subject touching the Constitution can survive judicial review. This issue, which goes to the heart of the ability of administrative agencies to enact and enforce regulations, also warrants review by this Court.

The court of appeals' failure to credit the statements in the Report and Order about how the FCC would implement the rules inappropriately failed to defer to the FCC's interpretation of its regulations. This Court, however, has held that "substantial deference" should be given "to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). That interpretation should be afforded "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Moreover, in interpreting a regulation based on a facial challenge, "[t]hat the regulation may be invalid as applied in [some] cases, however, does not mean that the regulation is facially invalid." *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991).

The court of appeals clearly ignored these standards for the appropriate deference due to an administrative agency. For example, the court of appeals thought the rules might be capable of unconstitutional application by causing broadcasters

to alter their newspaper advertising. 236 F.3d at 21 n.***, App. 14a. But there was no record support for this hypothetical. The court of appeals also refused to sever Option B from the remainder of the rules, despite recognizing that the FCC intended that the rules "be treated as severable." 232 F.3d at 22, App. 17a; see also 253 F.3d at 734, App. 22a. Moreover, the panel ignored the FCC's plain statements that it is not requiring targeted recruitment, and concluded, without reliance on evidence, that broadcasters would respond to the rules by conducting recruiting targeted towards particular groups. See R&O ¶ 77, App. 113a.

The court of appeals' decision therefore cast doubt upon the ability of administrative agencies to interpret their regulations, and to determine how they will implement those regulations. Because of the wide-ranging consequences this decision has for both FCC regulations and other agency regulations, this issue warrants review by this Court.

III. THE COURT OF APPEALS HAS, *SUB SILENTIO*, STRUCK DOWN ACTS OF CONGRESS THAT MANDATED THE FCC'S EEO RULES.

Review by this Court is also warranted because in finding the FCC's EEO rules unconstitutional, the court of appeals effectively struck down provisions of the Communications Act of 1934, as amended, which directed the FCC not to modify its EEO rules for television stations and to adopt EEO rules for cable, without even acknowledging that effect of its decision. A lower court's decision to hold a federal statute unconstitutional raises a question of obvious importance. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling

an Act of Congress.").[13] Review is especially warranted in this case because the court of appeals failed to acknowledge or even consider that its decision in effect invalidated a federal statute.

Section 334(a) of the Communications Act, enacted in 1992, explicitly prohibited the FCC from revising:

> "(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or
>
> (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission." 47 U.S.C. § 334(a), App. 279a.

The Conference Report accompanying this provision stated that it "codifie[d]" the FCC's EEO rules for television licensees, and that Congress intended that "this statutory provision be applied in the same manner as were the existing rules." H.R. Conf. Rep. No. 102-862, at 97 (1992).

The EEO rules codified by section 334(a) required each broadcast station to establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." 47 C.F.R. § 73.2080(b) (1992), App. 281a. Of particular relevance here, Form 396, adopted pursuant to the rules, required each station to report the sources that it used to attract qualified minority and female applicants and the number of referrals from each source. Form 396, Part III. The rule and

---

[13] When Congress codifies regulations and requires a federal agency to enforce them, the regulations take on the imprimatur of a direct congressional enactment, and their invalidation should be treated as though the court held a statute unconstitutional. See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947) (regulatory definitions drafted by government agency acting under Congressional authority have the same effect "as if they had been enacted by Congress directly").

associated forms also required each station to report the race and gender of its employees according to job category and to evaluate its employment profile against the availability of minorities and women in the recruitment area. 47 C.F.R. § 73.2080(c)(3) (1992), App. 283a–284a; Form 395; Form 396, Part VI.

In enacting section 334, Congress was well aware of these provisions in the FCC's former rules. The Conference Report stated that "[i]t is the intent of the conferrees that [FCC Forms 395 and 396] continue to be filed with the FCC." H.R. Conf. Rep. No. 102-862, at 97. The Report added that the FCC should "compare the workforce data" submitted in the forms "with the station's area labor force." *Id.*

Despite this Congressional ratification, the court of appeals in *Lutheran Church* struck down the FCC's former EEO rules on the ground that the required comparison between a broadcaster's employees and the composition of the local population was unconstitutional. 141 F.3d at 352. In response, the FCC drafted the new EEO rules to eliminate the provisions found objectionable in *Lutheran Church*, focusing on broad outreach to ensure equal opportunities. Yet, the court of appeals found reporting requirements necessary to monitor the effectiveness of those rules unconstitutional and struck down the entire rule.

Thus, the court of appeals' decision has left the FCC unable to comply with section 334 of the Communications Act. Contrary to Congress' plain language and intent, the FCC was required by *Lutheran Church* to revise its 1992 EEO rules and the associated forms as applied to television licensees. Furthermore, under the decision at issue here, the court of appeals has acted so as to prevent the FCC from collecting *any* data regarding the race and gender of job applicants necessary to monitor licensee compliance, even though Congress, in

enacting section 334, expressly approved of the Commission's collection of such data.

Moreover, the decision below also effectively renders unconstitutional EEO requirements for cable television systems set forth in section 634 of the Communications Act, 47 U.S.C. § 554, App. 286a, even though no party to this litigation challenged either section 634 or the FCC rules implementing it. Section 634 directs the FCC to adopt rules for cable operators that contain provisions virtually identical to those in the broadcasters' EEO rules. Following the decision below, the FCC acknowledged that it could no longer enforce its cable EEO rules after the court below struck down its broadcast EEO rules. *Suspension of the Broadcast & Cable Equal Employment Opportunity Outreach Program Requirements*, 16 F.C.C. Rcd. 2872 (2001).

In short, the decision of the court of appeals not only ran roughshod over the expressed intentions of the Federal Communications Commission, but it also ignored the express intention of Congress when it ratified the FCC's EEO rules. This disregard for statutes mandating the EEO rules is another reason why the Court should grant certiorari to review the decision below.

IV. THE ISSUES IN THIS CASE ARE RELATED TO ISSUES IN *ADARAND CONSTRUCTORS, INC.* V. *MINETA*.

As explained above, this case presents important questions about the constitutionality of programs adopted by the federal government to guarantee equal opportunity. This Court has already decided to hear argument during this Term in another case that presents a related question. This Court will shortly consider the constitutionality of the Department of Transportation's revised Disadvantaged Business Enterprise program in *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted sub nom. Adarand Constructors,*

Inc. v. *Mineta,* 121 S. Ct. 1401 (2001). This Court granted the petition for a writ of certiorari therein on the questions of (1) "Whether the court of appeals misapplied the strict scrutiny standard * * * " and (2) "Whether [the DOT's DBE] program is narrowly tailored to serve a compelling governmental interest." 121 S. Ct. 1598 (2001).

This Court's facial challenge jurisprudence will likely influence the decision in *Adarand.* The petitioners in *Adarand* are challenging the constitutionality of the Department of Transportation's program on its face. For that reason, the brief for the United States relies on decisions of this Court to defend the facial constitutionality of the Department of Transportation's program. *Brief for the Respondents* (in *Adarand*) at 19–20. Moreover, this Court's decision in *Adarand* will likely shed light on the kinds of programs and nature of the justifications that the federal government can use to guarantee equal opportunity.

Also at issue in *Adarand* is the proper standard for determining whether a program is "narrowly tailored" to serve a compelling governmental interest. In this case the court of appeals struck down the rules based on its view of the standards for "narrow tailoring." 236 F.3d at 21–22, App. 15a–17a. Any modification or refinement of those standards in *Adarand* will obviously impact the resolution of this case.

Review of the court of appeals' decision is therefore warranted because it would complement this Court's deliberations in *Adarand.* If the Court concludes that the issues in *Adarand* can be resolved adequately without reviewing this case, and that review of this case is not warranted independently, this petition should be held pending the Court's disposition of *Adarand* and then dealt with consistently thereafter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID HONIG
MINORITY MEDIA & TELECOMMUNICATIONS COUNCIL
3636 16th Street, N.W.
Washington, D.C. 20010
(202) 332-0500

FREDERICK C. SCHAFRICK
THOMAS J. MIKULA
Counsel of Record
ADAM M. CHUD
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

ANGELA J. CAMPBELL
AMY R. WOLVERTON
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9535

ELLIOT M. MINCBERG
LAWRENCE S. OTTINGER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M. Street, N.W.
Washington, D.C. 20036
(202) 467-4999

MARTHA F. DAVIS
NATIONAL ORGANIZATION FOR WOMEN
LEGAL DEFENSE AND EDUCATION FUND
399 Hudson Street
New York, NY 10014
(212) 925-6635

Attorneys for Petitioners

October 17, 2001